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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GERALD A. EUBANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on April 12, 1940, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14) is reported in 39 B. T. A. 583. The opinion of the Circuit Court of Appeals (R. 71) is reported in 110 F. (2d) 737.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940. (R. 73.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The ~~petitioner~~ respondent, a life insurance agent, became entitled to renewal commissions on policies sold by him. The question presented is whether his assignment of such income to another relieves him of tax thereon.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

STATEMENT

The facts, as stipulated (R. 40–68), and as found by the Board of Tax Appeals (R. 14–20), may be summarized as follows:

From January 1 to September 1, 1924, the taxpayer was employed by the Canada Life Assurance Company as its branch manager for the State of Michigan. Under the contract of employment he was entitled to renewal commissions on premiums thereafter collected with respect to life insurance policies sold prior to the termination of the contract. (R. 14–15.)

In November, 1924, he assigned his interest in these renewal commissions to the Union Trust Co., Detroit, Michigan (subsequently the Union Guardian Trust Co.). (R. 15.)

From September 1, 1924, to June 30, 1927, the taxpayer and one Hart, a partner, were general agents in New York for the Aetna Life Insurance Co., and from July 1, 1927, to August 31, 1927, the taxpayer individually was a general agent for said Aetna Company. (R. 15–16.) Under contracts with the Aetna he was likewise entitled to renewal commissions after the termination of his agency, without the performance of any further services. (R. 16.) In March, 1928, he assigned the commissions to become due him under the Aetna contracts. (R. 16–19.)

During the year 1933 the assignee received renewal commissions in the aggregate amount of

$15,612.79 payable under the above mentioned contracts. (R. 19–20.) The Commissioner of Internal Revenue ruled that those commissions should be included in the taxpayer's gross income. The Board of Tax Appeals approved that determination, but the Circuit Court of Appeals reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the renewal commissions which the taxpayer assigned to another should not be included in his gross income under Section 22 (a) of the Revenue Act of 1932.

2. In failing to hold that the renewal commissions which he assigned to another should be included in his gross income under Section 22 (a) of the Revenue Act of 1932.

3. In construing Section 22 (a) of the Revenue Act of 1932 so that it would apply only to an assignment of future earnings and not to one of past earnings.

4. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict, as the court below expressly recognized (R. 72), between the decision in the instant case and *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th), *Parker* v. *Routzahn*, 56 F. (2d) 730 (C. C. A. 6th), certiorari denied,

287 U. S. 606, and *Van Meter* v. *Commissioner*, 61 F. (2d) 817 (C. C. A. 8th).

2. The decision below is in conflict with *Lucas* v. *Earl*, 281 U. S. 111, where this Court held that the tax upon earnings could not be deflected by assignments or other anticipatory arrangements. The court below distinguished *Lucas* v. *Earl* on the ground that there the assignment related to earnings from future services whereas the assignments here were of earnings with respect to past services. However, as pointed out in Judge Patterson's dissenting opinion (R. 72–73), there is nothing in the opinion in *Lucas* v. *Earl* or in later decisions of this Court which so limits the holding in *Lucas* v. *Earl*. The majority of the court below must have recognized doubt as to its understanding of *Lucas* v. *Earl*, for it stated that the limitation which it read into that decision should be followed "unless higher authority determines it to be wrong." (R. 72.)

3. This case raises a question which is cognate to that presented in *Helvering* v. *Horst*, certiorari granted April 8, 1940, No. 27, 1940 Term, and it would be desirable to have both cases presented to the Court at the same time.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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PETITIONER'S BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 205

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GERALD A. EUBANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 8) is reported in 39 B. T. A. 583. The opinion of the Circuit Court of Appeals (R. 38) is reported in 110 F. (2d) 737.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940 (R. 41). The petition for a writ of certiorari was filed July 5, 1940, and granted October 14, 1940 (R. 41). The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The respondent, a life insurance agent, became entitled to renewal commissions on policies sold by him. The question presented is whether his assignment of such income to another relieves him of tax thereon.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (*a*) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

STATEMENT

The facts, as stipulated (R. 24–37), and as found by the Board of Tax Appeals (R. 9–12), may be summarized as follows:

From January 1 to September 1, 1924, the taxpayer was employed by the Canada Life Assurance Company as its branch manager for the State of Michigan. Under the contract of employment he was entitled to renewal commissions on premiums thereafter collected with respect to life insurance policies sold prior to the termination of the contract (R. 8–9).

In November 1924 he assigned his interest in these renewal commissions to the Union Trust Company, Detroit, Michigan (subsequently the Union Guardian Trust Company) (R. 9).

From September 1, 1924, to June 30, 1927, the taxpayer and one Hart, a partner, were general agents in New York for the Aetna Life Insurance Company, and from July 1, 1927, to August 31, 1927, the taxpayer individually was a general agent for said Aetna Company (R. 9). Under contracts with Aetna he was likewise entitled to renewal commissions after the termination of his agency, without the performance of any further services (R. 9). In March 1928 he assigned the commissions to become due him under the Aetna contracts (R. 10–11).

During the year 1933 the assignee received renewal commissions in the aggregate amount of $15,612.79 payable under the above-mentioned contracts (R. 11–12). The Commissioner of Internal Revenue ruled that those commissions should be included in the taxpayer's gross income. The

Board of Tax Appeals approved that determina tion, but the Circuit Court of Appeals reversed one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the renewal commissions whic the taxpayer assigned to another should not be in cluded in his gross income under Section 22 (a) o the Revenue Act of 1932.

2. In failing to hold that the renewal commis sions which he assigned to another should be in cluded in his gross income under Section 22 (a) of the Revenue Act of 1932.

3. In construing Section 22 (a) of the Revenu Act of 1932 so that it would apply only to an assign ment of future earnings and not to one of past earn ings.

4. In reversing the decision of the Board of Ta Appeals.

SUMMARY OF ARGUMENT

The income in question consists of renewal com missions on policies of life insurance to which th taxpayer was entitled by reason of prior sales o policies. It is income attributable to his persona services and is taxable to him notwithstanding hi attempt to deflect the income from himself by as signment.

The general principles discussed in our brief i *Helvering* v. *Horst,* No. 27, require that the as signor remain liable in such circumstances.

But, in any event, the income here is taxable to respondent under *Lucas* v. *Earl*, 281 U. S. 111, since it represents income from personal services. The decision in the *Earl* case makes it clear that the statute taxes earned income to the one who earns it, and that liability cannot be avoided by assigning the income to another. There is nothing in the language of the opinion in *Lucas* v. *Earl* which limits the decision to assignments of "future earnings." Indeed, the opinion makes it plain that taxability does not depend upon future performance of services by the assignor. The decision was rested upon the broad ground that, under the statute, earned income is taxable to the earner.

ARGUMENT

THIS CASE IS CONTROLLED BY *LUCAS* v. *EARL*, WHICH CONSTRUES THE STATUTE AS TAXING COMPENSATION TO THE ONE WHO EARNS IT, REGARDLESS OF ASSIGNMENTS

1. In our brief in *Helvering* v. *Horst*, No. 27, we contend that an assignment of income from property for the benefit of a member of the assignor's family cannot relieve the assignor of tax liability with respect to such income. We believe that the principles there discussed likewise require the assignor to remain liable here.[1] But even if

[1] The record herein shows that the renewal commissions were assigned to a trustee, the Union Trust Company of Detroit, Michigan, without disclosing the identity of the beneficiaries. However, if the Court, in considering here that portion of the *Horst* brief dealing with *Helvering* v. *Clifford*, 309 U. S. 331, believes that it is important to ascertain

we should be wrong on our second contention in the *Horst* case that the assignor's liability is not limited to assignments of *earned* income (as contrasted with income from property), then the assignor here is nevertheless taxable, since the assignments in this case were of earnings.[2]

2. Under Section 22 (a) of the Revenue Act of 1932 the taxpayer's gross income is defined to include income "derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid". And it was established at an early date that renewal commissions, such as are involved here, constitute income derived from "personal services" within the meaning of the revenue acts. *Edwards* v. *Keith*, 231 Fed. 110 (C. C. A. 2d). This Court denied certiorari (243 U. S. 638), and the result there

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the beneficiaries of the trust and remands the case for that purpose, the Government is prepared to show that the trustee was directed to pay premiums on fire insurance policies on real estate conveyed to the trust by the taxpayer and his wife, to pay all taxes assessed against such real estate, to pay interest and principal on mortgages upon such real estate, to pay premiums on policies of insurance on the taxpayer's life, to pay interest and principal on debts of the taxpayer or his wife to the trustee, and to pay any remaining income to the taxpayer's wife. And the Government is prepared to show further that upon his wife's death the corpus was to be delivered to him; or, should he predecease her, the trust was to continue for her life, at the end of which the corpus was to be distributed among their children per stripes.

[2] It may be noted that Judge Patterson, who wrote the opinion of the court in the *Horst* case against the Government, dissented here on that very ground.

reached does not seem to have been seriously challenged since that time. See *Woods* v. *Lewellyn*, 252 Fed. 106 (C. C. A. 3d).

The respondent herein seeks escape from tax solely upon the ground that he had assigned his renewal commissions and that they were paid by the insurance companies to the assignee rather than to himself. It is our position that such escape is blocked by *Lucas* v. *Earl*, 281 U. S. 111.

In *Lucas* v. *Earl*, the taxpayer made an assignment of one-half his future earnings to his wife by written contract executed in 1901, and the question was whether the contract relieved him of tax liability in 1920 and 1921 on one-half his earnings which, according to the contract, belonged to his wife. There was no dispute that the taxpayer's wife was legally entitled to one-half his earnings, and this Court in its opinion expressly assumed the validity of the contract between the spouses. Nevertheless the Court held that the husband's entire salary was taxable to him. In construing the applicable provisions of the Revenue Acts of 1918 and 1921, which are identical with the corresponding provisions in Section 22 (a) of the Revenue Act of 1932 here involved, Mr. Justice Holmes said (pp. 114–115):

> There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for

> a second in the man who earned it. That seems to us the import of the statute before us * * *.

The holding in *Lucas* v. *Earl* that earnings are taxable to the earner regardless of any contractual arrangement whereby they may be diverted to another, has been repeatedly recognized and approved by this Court. In *Poe* v. *Seaborn*, 282 U. S. 101, the Court, although ruling that income of the spouses in a community property state was to be divided equally between them for income-tax purposes, nevertheless carefully pointed out the scope of its holding in *Lucas* v. *Earl*, p. 117):

> We held that, assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, were his individual income, "derived from salaries, wages, or compensation for personal services" under §§210, 211, 212 (a) and 213 of the Revenue Act of 1918. The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.[3]

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[3] The result in *Poe* v. *Seaborn* itself seems to be founded on a distinction which we believe to be very tenuous. It appears to proceed on the legal fiction that obtains in the com-

In *Burnet* v. *Leininger,* 285 U. S. 136, this Court held that an agreement by a member of a partnership that his wife should be an equal partner with him in his interest in the company and should share equally with him the profits and losses did not relieve the husband from income tax on his full distributive share from the partnership. In the course of its opinion, this Court referred to its decision in *Lucas* v. *Earl* as follows (pp. 141–142):

> The case of *Lucas* v. *Earl,* 281 U. S. 111, is analogous. There the husband made a contract with his wife by which his salary and fees were to be "received, held, taken and owned" by them as joint tenants. The Court recognized that a forcible argument was presented "to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant in which they were received." But the case was deemed to turn on the import and reasonable construction of the taxing act. "There is no doubt" said

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munity property states to the effect that income received by either spouse is really the product of the joint efforts of both and that therefore the earnings belong to the "community" rather than to the individual spouse. By resorting to that fiction the Court was able to hold in *Poe* v. *Seaborn* that a husband's income in a community property state could be divided equally between the spouses for tax purposes because the earnings were that of the community. Without that fiction, the result there reached would seem to be inconsistent with *Lucas* v. *Earl.*

> the Court, "that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Id.*, pp. 114, 115. This ruling was not disturbed by *Poe* v. *Seaborn*, 282 U. S. 101, which pointed out the distinction. *Id.*, p. 117.

See also *Balkwill* v. *Commissioner*, 77 F. (2d) 569 (C. C. A. 6th), certiorari denied, 296 U. S. 609; *Kasch* v. *Commissioner*, 63 F. (2d) 466 (C. C. A. 5th); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520 (C. C. A. 2d).

Again, in *Blair* v. *Commissioner*, 300 U. S. 5, an assignor of a beneficial interest in a trust was held not taxable upon income from that portion of the trust, but the Court was careful to distinguish *Lucas* v. *Earl*, saying (p. 11):

> In the *Lucas* case the question was whether an attorney was taxable for the whole of his salary and fees earned by him in the tax years or only upon one-half by reason of an agreement with his wife by which his earn-

> ings were to be received and owned by them jointly. We were of the opinion that the case turned upon the construction of the taxing act. We said that "the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the same when paid from vesting even for a second in the man who earned it." That was deemed to be the meaning of the statute as to compensation for personal service, and the one who earned the income was held to be subject to the tax. * * *

See also *Griffiths* v. *Commissioner,* 308 U. S. 355, 358.

Moreover, the principles established in *Lucas* v. *Earl* have been applied in a wide variety of cases in the lower courts. E. g., *Daugherty* v. *Commissioner,* 63 F. (2d) 77 (C. C. A. 9th); *Jones* v. *Page,* 102 F. (2d) 144 (C. C. A. 5th), certiorari denied, 308 U. S. 562; *Saenger* v. *Commissioner,* 69 F. (2d) 631 (C. C. A. 5th); *Emery* v. *Commissioner,* 78 F. (2d) 437 (C. C. A. 1st); *Luce* v. *Burnet,* 55 F. (2d) 751 (App. D. C.); *Comer* v. *Davis,* 107 F. (2d) 355 (C. C. A. 5th); *Turbeville* v. *Commissioner,* 84 F. (2d) 307 (C. C. A. 5th); *Blumenthal* v. *Commissioner,* 60 F. (2d) 715 (C. C. A. 2d); *Helvering* v. *Gordon,* 87 F. (2d) 663, 666 (C. C. A. 8th); *Rossmoore* v. *Anderson,* 67 F. (2d) 1009 (C. C. A. 2d), affirming 1 F. Supp. 35 (S. D. N. Y.); *Groves* v.

Commissioner, 99 F. (2d) 179 (C. C. A. 4th).[4] And the doctrine of *Lucas* v. *Earl* has been applied to assignments of renewal commissions such as are involved in the case at bar. *Van Meter* v. *Commissioner,* 61 F. (2d) 817 (C. C. A. 8th); *Bishop* v. *Commissioner,* 54 F. (2d) 298 (C. C. A. 7th); *Parker* v. *Routzahn,* 56 F. (2d) 730 (C. C. A. 6th), certiorari denied, 287 U. S. 606. *Contra: Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C.), certiorari denied, 285 U. S. 552.

The court below undertook to distinguish *Lucas* v. *Earl* on the ground that the taxpayer here had already completed his services when he made the assignments in question, whereas the taxpayer in the *Earl* case had not yet performed the services at the time of assignment. But, as Judge Patterson pointed out in his dissenting opinion, there is nothing in the opinion in *Lucas* v. *Earl* that so confines its holding (R. ~~72–73~~):

> There the assignment was made in advance of earning the compensation, but the court put no stress on that feature. It was laid down broadly that the person taxed on ac-

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[4] However, the decisions in the lower courts have not been entirely uniform. See *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3d) (assignment of patent rights); *Helvering* v. *Seatree,* 72 F. (2d) 67 (App. D. C.) (assignment of payments for good-will). (The Circuit Court of Appeals for the Second Circuit has itself recognized confusion among the decisions. See *Rossmoore* v. *Commissioner,* 76 F. (2d) 520, 521–522 (C. C. A. 2d).

> count of personal compensation was the earner, and that the tax could not be deflected from him to another by means of an assignment. * * *

Indeed, a careful reading of the opinion in *Lucas* v. *Earl* will disclose that the Court deliberately rested the result upon the broad ground that income from services is taxed to the one who earned it. The taxpayer had argued that the disputed salary and fees became the property of his wife "on the very first instant on which they were received" (281 U. S., at 114). The Court expressed doubt as to the soundness of that contention, saying: "We might well hesitate upon the latter proposition, because however the matter might stand between husband and wife he was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but himself alone." Thus, the Court indicated that it might have decided the case on the narrow ground that the taxpayer's continued efforts were necessary to produce the income in question. But the Court proceeded to disclaim any intention of deciding the case upon such narrow ground. Immediately following the language just quoted, the Court stated (281 U. S., at 114):

> But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act.

The Court then went on to hold broadly that the statute taxed salaries to those who earned them. Thus, it is apparent from the opinion itself in *Lucas* v. *Earl* that there is no warrant for the limitation which the court below engrafted upon that decision.

The Government's position is in accord with a Treasury ruling which squarely covers the situation presented in the instant case. G. C. M. 19213, 1937–2 Cum. Bull. 220. Although it is true that this ruling was not embodied in a formal "Treasury Decision" and therefore does not have the same dignity as a regulation, it is nevertheless a correct construction of the statute and should be followed.

If the "past services" formula of the court below is correct, the opportunity for tax avoidance would be alarming. Thus, a lawyer at the end of each year might assign to his wife his fees for services already performed, and claim tax immunity on such fees as are paid to his wife. It seems impossible to believe that *Lucas* v. *Earl* ever intended to sanction the efficacy of such a device. Indeed, any fair reading of the opinion brings one irresistibly to the conclusion that the assignor would remain liable.

CONCLUSION

The judgment of the court below should be reversed and that of the Board of Tax Appeals affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
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OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940